Filed 1/23/19 Boktor v. Applebaum CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

AGUSTINA BOKTOR, Plaintiff and Appellant, v. ARNOLD APPLEBAUM, Defendant and Respondent.	G055509 (Super. Ct. No. 30-2016-00856212) O P I N I O N

Appeal from an order of the Superior Court of Orange County, William D. Claster, Judge. Affirmed.

Perona, Langer, Beck, Serbin & Harrison, Ellen R. Serbin, and Brennan S. Kahn for Plaintiff and Appellant.

Stuart Kane, Robert J. Kane and Shane P. Criqui for Defendant and Respondent.

Arnold Applebaum employed Agustina Boktor for several years as a housekeeper and nanny to care for his school-age daughter (Daughter). After Applebaum terminated Boktor's employment, she filed a complaint with the Labor Commissioner (commissioner), an administrative remedy set forth in Labor Code sections 98 et seq.[1] The commissioner determined Applebaum owed $4,500 for overtime work, not the $400,000 Boktor requested. Unhappy with this ruling, Boktor appealed the decision and pursuant to section 98.2, subdivision (a), was afforded a trial de novo in the superior court. The trial court determined Applebaum owed Boktor $300 for unpaid overtime and imposed several penalties and interest. Boktor then filed a motion for attorney fees first under section 98.2, subdivision (c), and later under section 1194.

The trial court did not resolve the issue of whether Boktor was entitled to attorney fees under either section 98.2 or section 1194. Instead, the trial court presumed attorney fees were available under section 1194, but could be denied because Boktor designated her action as an unlimited civil case when it should have been filed as a limited civil case. (Code Civ. Proc., § 1033, subd. (a).)

On appeal, the parties' arguments focus on the issue of whether the trial court abused its discretionary authority under Code of Civil Procedure section 1033 in denying fees. However, we have determined the better course of action is to take a step back and decide the preliminary legal issue of whether attorney fees were recoverable under either section 98.2 or section 1194. We conclude Boktor had the option of seeking overtime compensation by filing a civil action (§ 1194) or by pursuing an administrative remedy (§ 98 et seq.), and because she elected the latter option her right to recover attorney fees was governed by administrative remedy provisions (§ 98.2, subd. (c)), not the judicial attorney fee provision (§ 1194). We affirm the trial court's order because

---

[1] All further statutory references are to the Labor Code, unless otherwise indicated.

Boktor was not entitled to recover attorney fees under the terms of section 98.2, subdivision (c).

FACTS

This appeal concerns a purely legal question, and therefore, we need only summarize the relevant undisputed facts as described in the commissioner's and trial court's judgments. Boktor worked for Applebaum from August 2011 to January 2014. Applebaum paid her $25 per hour for eight hours of work Monday through Friday. Her scheduled hours consisted of two daily shifts (7:00 a.m. to11:00 a.m. and 3:00 p.m. to 7:00 p.m.) on Monday, Tuesday, Thursday, and Friday. On Wednesdays, she worked the same morning shift but the afternoon was slightly different (1:00 p.m. to 5:00 p.m.). Boktor filled out timecards throughout her employment. Applebaum did not pay for overtime.

After Applebaum terminated Boktor, she filed a claim with the commissioner seeking damages for unpaid overtime. She sought $398,300 in overtime wages and $72,928 in liquidated damages, plus additional wages accrued pursuant to section 203 as a penalty at the daily rate of $375.

In the final decision, the commissioner discussed the evidence presented by both parties and the applicable legal authority. It determined Boktor's testimony lacked credibility. The commissioner concluded, "Based on all credible testimony and documentary evidence presented, and absent any credible, definitive testimony regarding the frequency with which [Boktor] asked to leave early and take [Daughter] with her, it would be reasonable to conclude that beginning September 5, 2011 and for a 120-week period ending January 2, 2014, for an estimated two days per month, [Boktor] worked 8.5 hours on days when she left early with [Daughter], for which she recorded and was paid eight hours. Therefore, [Boktor] is owed $4,500.00 in overtime wages (.5 hour times two, or one hour per month, times 120 months (120 hours), at $37.50, based on $25.00 per hour times 1.5)."

With respect to liquidated damages, the commissioner ruled Boktor "worked 120 overtime hours at the minimum wage rate of $8.00 per hour, and she did not receive any wages for this work. Therefore, [Boktor] is owed $960.00 in liquidated damages (120 hours at $8.00)." In addition, the commissioner determined Boktor was entitled to $1,293.94 interest on all unpaid wages and $6,000 in waiting time penalties (30 days at $200 based on a daily rate of $25/hour for 8 hours).

Boktor's total award was $12,753.94. She filed an appeal in superior court. Her case was assigned a civil unlimited case number because she claimed the amount demanded exceeded $25,000.

The de novo trial for Boktor's appeal lasted four days. The trial court's final decision discussed the evidence presented by both parties. It commented, "The testimony in support of and in opposition to these claims hardly could have been more different." Boktor maintained she worked between 60 to 100 hours per week and was not paid overtime. She and her husband testified Daughter spent the night at their house two or three times a week. Applebaum, Daughter, and other witnesses disputed Boktor's allegations. Applebaum presented timecards reflecting Boktor worked 40 hours per week. The court determined, "At the end of the day, it is difficult to fully credit any of the main witnesses[.]" The court believed they provided biased testimony, but due to other testimony the court concluded Boktor "with one exception" failed to satisfy her burden of proof in the case.

The court reached the following conclusion: "Although the [c]ourt cannot credit much of [Boktor's] testimony, it has little doubt that there were days that she ran errands between 11:00 a.m. and 3:00 p.m. and/or did housework during these hours. There also probably were days that she stayed late at [Applebaum's] house, as well as days that she worked less than the full eight hours. The problem, however, is determining when those days occurred and how to reconcile, for example, her arriving late one morning with an errand she may have run that day at noon. [Boktor] provides no

credible methodology for determining whether long or short days happened routinely or once in a blue moon. The fact that [Boktor] may have taken the dog to the vet one day before 3:00 p.m. or took [Daughter] out of school one day at 2:00 p.m. for a 3:00 p.m. dentist appointment is simply not a sufficient basis to extrapolate hours over a [two and one-half year] period. By the same token, [Boktor's husband's] testimony that [Boktor] actually worked 40 minutes less per day than she claimed on her time cards (by virtue of the times she left and returned to their home) also is not a particularly reliable basis for extrapolating."

The court added, "Moreover, to the extent there are records of those hours . . . they undermine her claims. Those records show no overtime (other than for the first [three] weeks), and also show no weekend work. For better or worse, the [c]ourt accepts those records as the best evidence of [Boktor's] hours. As for the weekends, the fact that [Daughter] stayed at [Boktor's] house on occasion (but not nearly as often as [Boktor] claimed) does not translate into compensable work. The [c]ourt concludes that it was [Boktor] who initiated these overnight stays and that she did so not as a nanny but more as a friend or quasi-grandmother who enjoyed [Daughter's] company. The same is true with the several family vacations [Boktor] went on with the Applebaums. The [c]ourt concludes that [Boktor] made requests to go on these vacations and that she was not required (or 'suffered or permitted to work') on these occasions. [Citation.] [¶] Accordingly, the [c]ourt declines to award any amounts to [Boktor] other than 8 hours of additional overtime pay for the first 3 weeks of her employment. For those 15 days, [Boktor] time cards show that she worked 9 hours each day (except one day where she worked 9.5 hours), but was paid a total of 7.5 hours of overtime or only 30 minutes per day of overtime. [Applebaum's] argument that the other 30 minutes each day was for a meal period is not supported by any evidence. Thus, [Boktor] is entitled to unpaid overtime for an additional 8 hours of work totaling $300 (8 x $37.50). [She] is also entitled to interest on this amount from the date it was owed. Finally, inasmuch as

[Applebaum] presented no evidence explaining the non-payment of this overtime amount, or any evidence establishing the existence of a good faith dispute regarding the overtime amount, the [c]ourt concludes that the non-payment qualifies as willful under . . . [s]ection 203 and, therefore, assesses waiting time penalties of $6,000 (30 days x $200 per day)."

Boktor moved for an award of attorney fees ($124,132.50) and costs ($9,665) as mandated by section 98.2, subdivision (c). Applebaum filed an opposition raising the following arguments: (1) Boktor was not a prevailing party as defined in section 98.2, subdivision (c); (2) attorney fees are not recoverable when an employee obtains a less favorable judgment on appeal than what she was awarded by the commissioner; (3) the court has discretion to deny fees under Code of Civil Procedure section 1033, subdivision (a) because Boktor filed the appeal in an inappropriate forum; and (4) the requested attorney fees were unreasonably high. Boktor filed a reply brief arguing attorney fees were recoverable under both sections 98.2 and 1194.

The court denied Boktor's motion for attorney fees and granted Applebaum's motion to strike all costs. It concluded there was no need to resolve the legal issue of whether Boktor could recover attorney fees under section 1194 because "even if" she could, the court would exercise its discretion under Code of Civil Procedure section 1033 to deny costs and fees. The court explained, "[Boktor] could not have reasonably and in good faith expected to recover more than the jurisdictional limit of $25,000 for limited civil actions. Simply put, there was a serious lack of competent evidence to show that [she] was owed more than $25,000 in damages. [Boktor] was aware of this challenge, in light of the [commissioner's] comments of [Boktor's] credibility and failure to present sufficient supporting documentary evidence. [Citations.] [¶] And at trial, this [c]ourt did not find [Boktor's] testimony, among others, to be credible either. [Citation.] Indeed, 'it seemed more likely to the [c]ourt that [Boktor] was having difficulty remembering a "script" that she was supposed to follow. Many of

her answers appeared uncertain, and often were preceded or followed by the word "maybe." . . . Aside from the time records for the first three weeks of her employment, [Boktor] did not provide any competent testimony or documentary evidence to show when and the lengths of time worked for which [Boktor] claims she was not paid or underpaid. . . . [¶] In light of the foregoing, the [c]ourt finds that it was unreasonable for [Boktor] to (1) incur over $120,000 in attorney fees and almost $10,000 in costs without more concrete proof of hours worked, and (2) appeal the [commissioner's] award of $12,750 only to receive half of the award."

DISCUSSION

Ordinarily, our review of an attorney fee award is performed under the abuse of discretion standard. However, in this case de novo review is warranted because the issue is dependent on statutory interpretation. (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1426 (*Earley*).) We therefore exercise our independent review.

I. *Overview of Administrative and Judicial Remedies to Recover Unpaid Overtime*

"Under the Labor Code, 'If an employer fails to pay wages in the amount, time or manner required by contract or by statute, the employee has two principal options. The employee may seek *judicial* relief by filing an ordinary civil action against the employer for breach of contract and/or for the wages prescribed by statute. (§§ 218, 1194.) Or the employee may seek *administrative* relief by filing a wage claim with the commissioner pursuant to a special statutory scheme codified in sections 98 to 98.8.' [Citations.]" (*Sampson v. Parking Service 2000 Com., Inc.* (2004) 117 Cal.App.4th 212, 218 (*Sampson*).)

A. *Administrative Relief*

Here, Boktor filed an administrative complaint with the commissioner to recover overtime compensation and unpaid wages. Sections 98 through 98.2 provide the remedial procedures and gives the commissioner authority to adjudicate these wage claims through a special administrative process. (*Sampson, supra,* 117 Cal.App.4th at pp.

218-219.) Our Supreme Court summarized the process in *Post v. Palo/Haklar & Associates* (2000) 23 Cal.4th 942, 946 (*Post*) as follows: "The statute provides for three alternatives: the commissioner may either accept the matter and conduct an administrative hearing [citation], prosecute a civil action for the collection of wages and other money payable to employees arising out of an employment relationship [citation], or take no further action on the complaint. [Citation.] [¶] If the commissioner decides to accept the matter and conduct an administrative hearing—commonly known as a "Berman hearing" after the name of its sponsor, then Assemblyman Howard Berman—he or she must hold the hearing within 90 days . . . . [Citation.]"

"The Berman hearing procedure is designed to provide a speedy, informal, and affordable method of resolving wage claims. [Citation.] '[T]he purpose of the Berman hearing procedure is to avoid recourse to costly and time-consuming judicial proceedings in all but the most complex of wage claims.' [Citation.]" (*Post, supra,* 23 Cal.4th at p. 947.)

"[T]he parties may seek review by filing an appeal to the . . . superior court 'in accordance with the appropriate rules of jurisdiction, where the appeal shall be heard de novo.' [Citation.] The timely filing of a notice of appeal forestalls the commissioner's decision, terminates his or her jurisdiction, and vests jurisdiction to conduct a hearing de novo in the appropriate court. [Citation.] If no party takes an appeal, the commissioner's decision will be deemed a judgment, final immediately and enforceable as a judgment in a civil action. [Citations.]" (*Post, supra,* 23 Cal.4th at p. 947.)

"Although denoted an 'appeal,' unlike a conventional appeal in a civil action, hearing under the Labor Code is de novo. [Citation.] "'A hearing *de novo* [under section 98.2] literally means a new hearing," that is, a new trial.' [Citation.] The decision of the commissioner is 'entitled to no weight whatsoever, and the proceedings are truly "a trial anew in the fullest sense."' [Citation.] The decision of the trial court,

after de novo hearing, is subject to a conventional appeal to an appropriate appellate court. [Citation.] Review is of the facts presented to the trial court, which may include entirely new evidence. [Citations.]" (*Post, supra,* 23 Cal.4th at pp. 947-948.)

"Because of the 'informal nature of the Berman hearing, the commissioner has no occasion to consider, much less award, attorney fees or costs in the administrative proceeding . . . .' [Citation.] Section 98.2, subdivision (c), however, provides for an award of attorney fees and costs against a party who appeals the commissioner's award . . . and is 'unsuccessful in the appeal.'" (*Sampson, supra,* 117 Cal.App.4th at p. 220.)

Specifically, section 98.2, subdivision (c), provides: "If the party seeking review by filing an appeal to the superior court is unsuccessful in the appeal, the court shall determine the costs and reasonable attorney's fees incurred by the other parties to the appeal, and assess that amount as a cost upon the party filing the appeal. An employee is successful *if the court awards an amount greater than zero*." (Italics added.)

"This statute 'is not a prevailing party fee provision, instead it is a one-way fee-shifting scheme that penalizes an unsuccessful party who appeals the commissioner's decision.' [Citation.] Its purpose is to 'act[ ] as a disincentive to appeal the commissioner's decision' (*id.* at p. 1438) and to 'discourag[e] unmeritorious appeals of wage claims, thereby reducing the costs and delays of prolonged disputes, by *imposing the full costs of litigation on the unsuccessful appellant*' [citation]." (*Nishiki v. Danko Meredith, P.C.* (2018) 25 Cal.App.5th 883, 894.)

B. *Judicial Remedy*

As mentioned, the administrative procedure is not an exclusive remedy. The employee may seek judicial relief by filing an ordinary civil court action against the employer for breach of contract and/or for the wages prescribed by statute. (§§ 218, 1194.)

"Section 218 authorizes an employee or his or her assignee to 'sue directly' for any unpaid wages or penalty owed under the Labor Code." (*Sampson, supra,* 117

Cal.App.4th at p. 220, fn. omitted.) Section 218.5 provides a prevailing party fee provision, permitting successful employees or employers to recover their attorney fees. It authorizes the trial court to award reasonable attorney fees and cost to the "prevailing party" in "any action brought for the nonpayment of wages . . . if any party to the action requests" fees and costs when the action was initiated in the superior court. (§ 218.5, subd. (a).) The term "'any action' in section 218.5 refers to 'any cause of action.'" (*Aleman v. AirTouch Cellular* (2012) 209 Cal.App.4th 556, 584 (*Aleman*).)

This statute has four express exceptions, but only one is relevant to this case. Section 218.5, subdivision (b), provides: "This section does not apply to any cause of action for which attorney's fees are recoverable under [s]ection 1194." As we will explain in more detail below, section 1194 permits an employee to recover attorney fees if he or she prevails in a "civil action" seeking minimum wages or overtime. Accordingly, the exception to 218.5, subdivision (b), means a prevailing employer cannot recover attorney fees if the underlying claim concerns minimum wages or overtime. (*Earley, supra*, 79 Cal.App.4th at p. 1429.) However, this exception does not preclude a prevailing employer from being awarded attorney fees related to other eligible claims under section 218.5, i.e., a wage claim unrelated to minimum wage or overtime compensation. (*Aleman, supra*, 209 Cal.App.4th at pp. 583-584.) Because the term "any action" refers to any cause of action, an employer may be awarded and apportioned attorney fees on the eligible causes of action, even if the case also involved claims subject to section 1194. (*Ibid.*)

Section 1194, subdivision (a), is a more specifically worded statute than section 218.5, and authorizes an employee to initiate a civil action to recovery unpaid minimum wage or overtime compensation. It provides, "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation . . . is entitled to recover in a civil action the unpaid

balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit." (*Ibid.*)

Unlike section 218.5, this statute's attorney fee provision is one-sided. "Section 1194 is a specific statute that allows successful employees (but not successful employers) to recover attorney[] fees." (*Eicher v. Advanced Business Integrators, Inc.* (2007) 151 Cal.App.4th 1363, 1379 (*Eicher*).) It is a "'"'"one-way" fee-shifting statute,' the purpose of which is to provide a '"'needed disincentive to violation of minimum wage laws.' [Citation.]"' [Citation.]" (*Id.* at p. 1380.) One-sided fee-shifting statutes "are created by legislators as a deliberate stratagem for advancing some public purpose, usually by encouraging more effective enforcement of some important public policy." (*Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal.App.3d 318, 324.)

In *Earley, supra*, 79 Cal.App.4th 1420, the court resolved a perceived conflict between the attorney fees provisions of sections 1194 and 218.5. After analyzing the statutes, the court concluded the Legislature intended section 1194 alone to apply to civil actions seeking to recover unpaid overtime compensation, even though such claims could be construed as seeking payment of wages under section 218.5. (*Id.* at p. 1430.)

The *Earley* court explained, "The only reasonable interpretation which would avoid nullification of section 1194 would be one which bars employers from relying on section 218.5 to recover fees in any action for *minimum* wages or *overtime* compensation. Section 218.5 would still be available for an action brought to recover nonpayment of contractually agreed-upon or bargained-for 'wages . . . .' [Fn. omitted.] [¶] Such a harmonization of these two sections is fully justified. An employee's right to wages and overtime compensation clearly have different sources. Straight-time wages . . . are a matter of private contract between the employer and employee. Entitlement to overtime compensation, on the other hand, is mandated by statute and is based on an important public policy." (*Earley, supra,* 79 Cal.App.4th at p. 1429.)

II. *Analysis Regarding* "*Actions*" *Covered by Section 1194*

In this case, Boktor asserts section 1194, not section 218.5, is applicable because she sought overtime compensation. She provides case authority supporting her statutory interpretation of section 1194 as setting forth a *mandatory* fee provision to benefit employees. She explains public policy amply supports this interpretation, which serves to encourage workers to enforce the minimum wage and overtime laws "'in situations where they otherwise would not find it economical to sue.' [Citation.]" (*Early*, *supra*, 79 Cal.App.4th at pp. 1430-1431.) She concludes that a mandatory fee provision such as section 1194 cannot be nullified by Code of Civil Procedure section 1033.

Missing from Boktor's argument are the reasons why she believes section 1194, and not section 98.2, subdivision (c), applies to an administrative appeal. Indeed, her briefing ignores the attorney fee provision included as part of the special statutory scheme describing administrative relief (§ 98.2, subd. (c)). It appears Boktor would like this court to treat her section 98.2 administrative appeal as being the equivalent of a newly filed civil action seeking overtime compensation. Neither party addresses this issue, and we have discovered conflicting case authority. For reasons discussed below, we conclude Boktor's right to attorney fees after electing an administrative remedy is governed by the administrative attorney fee remedy described in section 98.2, subdivision (c), not section 1194.

We find instructive *Sampson*, *supra*, 117 Cal.App.4th 212. In that case, the employee filed an administrative wage claim against his former employer seeking overtime compensation and other wages. (*Id.* at p. 216.) He prevailed, and the court awarded him approximately $58,350. (*Ibid.*) The employer appealed the decision in the superior court, resulting in a five-day de novo trial as required by section 98.2, subdivision (a). The court awarded the employee $29,227, which included $11,812 in overtime compensation. (*Ibid.*) As the prevailing party, the employee asked the trial

court to award over $45,000 in attorney fees under section 1194. (*Ibid.*) This sum represented attorney fees incurred during both the administrative proceedings and the de novo hearing held in superior court. The employer opposed the motion, arguing the employee could only recover fees incurred during the appeal under section 98.2, subdivision (c). (*Ibid.*) The trial court determined the commissioner's administrative proceeding was not a "civil action" within the meaning of section 1194 and the employee could only recover attorney fees incurred during the appeal as a prevailing respondent as described under section 98.2, subdivision (c). The employee appealed the decision, arguing the trial court erred in its interpretation of section 1194. (*Id.* at pp. 216-217.)

The appellate court affirmed the trial court's ruling. (*Sampson, supra,* 117 Cal.App.4th at p. 215.) It stated section 1194 permitted recovery of attorney fees to an employee prevailing "in a civil action" for minimum wage and overtime compensation but the statute did not define the term "civil action." It reasoned, "In this case, we must decide whether the term 'civil action' as it appears in section 1194 means only actions filed in court, or whether it also includes administrative proceedings before the commissioner to recover overtime wages. We conclude that a civil action is one filed in court. We further conclude that because [the employee] elected to pursue his administrative remedy, his right to recover attorney fees is not governed by section 1194, but by section 98.2, subdivision (c). The right to recover attorney fees in that code section is limited to those fees incurred on appeal from the commissioner's decision." (*Ibid,* fn. omitted.) Accordingly, the court affirmed the trial court's order limiting the attorney fees to those incurred in the trial de novo following his employer's appeal of the commissioner's decision. (*Id.* at p. 216.)

We recognize the *Sampson* case is not directly on point for the legal question we must decide in this appeal. It did not specifically consider the issue of whether section 1194 applied to attorney fees incurred during employee's appeal because in that case the employee was a "prevailing respondent" and recovered attorney fees

under section 98.2, subdivision (c). (*Sampson, supra,* 117 Cal.App.4th at p. 215.) Nevertheless, we conclude the *Sampson* court's in-depth statutory analysis of section 1194 is applicable because the right to an appeal, like a Berman hearing, is defined in the same special statutory scheme created to give employee's administrative relief (codified in sections 98 to 98.8). We adopt the *Sampson* court's construction of section 1194 in deciding this appeal. We hold section 98.2, subdivision (c), not section 1194, governs an employee's right to recover attorney fees incurred during an appeal of the commissioner's decision.

The *Sampson* court began its analysis by discussing the procedural context in which the attorney fee dispute arose, highlighting the differences between the administrative remedy set forth in the special statutory scheme codified in sections 98 to 98.8, from an employee's judicial remedy provided for in sections 218 and 1194. (*Sampson, supra,* 117 Cal.App.4th at pp. 218-220.) As described earlier in this opinion, the *Sampson* court also explained why the attorney fee provisions provided for within the administrative remedy were not identical to those provided for in the judicial remedy. Specifically, a commissioner cannot award attorney fees as part of the administrative proceedings, and section 98.2, subdivision (c), provides for attorney fees and costs *against* the unsuccessful party who appeals the commissioner's award by seeking a trial de novo. (*Id*. at p. 220.) In contrast, a trial judge may award fees to the prevailing party (employer or employee) in a civil action for wage disputes unrelated to minimum wage and overtime compensation (§ 218.5) or to the prevailing employee in a minimum wage or overtime compensation dispute (§ 1194). The court noted there were several other cases discussing section 1194, but none of them attempted to define "civil action" or address whether section 1194 applied to overtime claims filed in both administrative and judicial forums. (*Id.* at pp. 220-222.)

Given the absence of any binding legal authority on the issue, the *Sampson* court utilized the well-accepted tools for statutory construction to define the term "civil

action" as used in section 1194. (*Sampson, supra*, 117 Cal.App.4th at p. 217.) It began by rejecting the employee's argument the court should "import the definition of that term from section 30 of the Code of Civil Procedure." (*Ibid.*) That provision defined a civil action as "an action 'prosecuted by one party against another for the declaration, enforcement or protection of a right[.]'" (*Ibid.*) The employee maintained this definition, inserted into section 1194, would mean the provision applied regardless of the selected forum. (*Id.* at pp. 217-218.)

The *Sampson* court determined the rules of statutory construction did not support the employee's construction of section 1194. (*Sampson, supra*, 117 Cal.App.4th at p. 223.) It provided the following explanation: "The phrase 'civil action' is plain and not reasonably susceptible to more than one interpretation. Although the Labor Code does not define civil action, that term is defined in the Code of Civil Procedure. [The employee] solely focuses on [the language of one provision and] ignores the statutory context of section 30 of the Code of Civil Procedure. In context, the term 'civil action' unambiguously refers to a court action." (*Ibid.*)

The court reasoned that when read in context, Code of Civil Procedure section 30 did not support the theory a "civil action" may include action not initiated in a court. "We begin with section 22 of the Code of Civil Procedure which provides: 'An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' The statutory scheme then states that there are two kinds of actions, civil and criminal. (Code Civ. Proc., § 24.) Next, it provides that a civil action arises out of an obligation or injury, defining each of those terms (Code Civ. Proc., §§ 25-29), and sets forth the principal characteristics of a civil action, distinguishing it from a criminal action (Code Civ. Proc., § 30). Following these sections, all of which are devoted to civil actions, the next section states: 'The

Penal Code defines and provides for the prosecution of a criminal action.' (Code Civ. Proc., § 31.)" (*Sampson, supra,* 117 Cal.App.4th at p. 224.)

The court concluded that when looking at the statutory scheme, "[t]he relevant and dispositive definition of 'civil action' is set out in section 22 of the Code of Civil Procedure, which is defined as a proceeding in a court of justice." (*Sampson, supra,* 117 Cal.App.4th at p. 224.) It held this definition should be used when the term "civil action" is used in section 1194. "Civil action" refers to an action filed in court. (*Id.* at p. 223.)

The *Sampson* court noted there is a second reason why the principles of statutory construction support this interpretation of "civil action." (*Sampson, supra,* 117 Cal.App.4th at p. 224.) It stated, "In addition, even though the Labor Code does not define 'civil action,' the context in which that phrase is used in that code unambiguously refers to an action filed in court. Under the Labor Code, the [commissioner] may 'commence and prosecute a civil action to recover unpaid minimum wages or unpaid overtime compensation.' (§ 1193.6, subd. (a).) This clearly contemplates a civil action *filed by the commissioner* in court. (See also §§ 210, 225.5 [commissioner may bring an 'independent civil action' to recover civil penalty for failure to pay wages].) It would be illogical and absurd to construe 'civil action' to refer to administrative proceedings *before the commissioner,* when the Labor Code confers authority *on the commissioner* to prosecute a civil action for overtime compensation." (*Id.* at pp. 224-225, fn. omitted.)

Next, the court considered the Legislative purpose in creating a special administrative forum to resolve wage disputes, and it concluded these goals cannot be reconciled with the employee's statutory construction of section 1194. (*Sampson, supra,* 117 Cal.App.4th at pp. 225-226.) "Statutes must be harmonized, both internally and with each other whenever possible. [Citations.] . . . [¶] [The employee's] construction cannot be harmonized because it *improperly blurs the well-drawn lines between the administrative and judicial remedy in the Labor Code to resolve wage disputes*. Our

Supreme Court has consistently recognized the well-settled principle that an employee has the option of pursuing one or the other remedy. [Citations.]" (*Id.* at p. 226, italics added.)

The court determined the Legislature's purpose in providing the employee with the option of the Berman hearing procedure was "'to avoid recourse to costly and time-consuming judicial proceedings in all but the most complex of wage claims.' [Citation.]" (*Sampson, supra,* 117 Cal.App.4th at p. 226.) The court reasoned, "Applying section 1194 to administrative proceedings does not serve that purpose because to do so would eliminate the cost benefit to proceeding in the administrative forum. Indeed, consistent with that purpose, section 98.2, subdivision (c), limits the recoverability of attorney fees to those incurred following the Berman hearing procedure. In addition, the fact that section 98.2, subdivision (c), is contained in the same chapter as the administrative remedy is a strong indication that the Legislature intended that attorney fees provision, and not section 1194, to be the sole basis for recovery of attorney fees in wage disputes brought under the Berman hearing procedure. To read section 1194 as applicable to administrative proceedings would render section 98.2, subdivision (c), meaningless and without actual application. A settled rule of statutory construction requires that we give effect and meaning to all parts of the law if possible and to avoid an interpretation that renders statutory language superfluous. [Citation.] We would violate this rule if we were to construe section 1194 as the controlling attorney fees provision in administrative proceedings. Such a construction would render section 98.2, subdivision (c), mere surplusage." (*Id.* at pp. 226-227.)

The court determined its interpretation was "in harmony with the legislative purpose of providing an alternative administrative forum" that is speedy and affordable. (*Sampson, supra,* 117 Cal.App.4th at p. 227.) "The administrative remedy provides specific time requirements to assure that any dispute over wages is promptly resolved to achieve the public policy of the prompt payment of wages." (*Ibid*.)

Finally, the court examined the legislative history of section 98.2, subdivision (c). (*Sampson, supra*, 117 Cal.App.4th at pp. 227-228.) "While the legislative history of section 98.2, subdivision (c), does not have as its 'paramount purpose' the prompt payment of wages, its purpose is 'the promotion of the finality of the commissioner's decisions and awards by discouraging frivolous appeals to the courts by either party.' [Citations.] The Legislature apparently has concluded that any other fee-shifting provision would not serve the overall purpose of the administrative remedy. We cannot rewrite the Labor Code to give [the employee] the benefits of the administrative remedy, that is the prompt payment of wages, and the benefits of recovering all his attorney fees to prosecute his claim under the judicial remedy. We therefore conclude that if an employee pursues an administrative remedy under section 98 to recover overtime compensation, the sole right to recover attorney fees is governed by section 98.2, subdivision (c), and not section 1194." (*Ibid.*; see also *Lolley v. Campbell* (2002) 28 Cal.4th 367, 376 [section 98.2, subdivision (c), was intended to "discourag[e] unmeritorious appeals of wage claims, thereby reducing the costs and delays of prolonged disputes, by imposing the full costs of litigation on the unsuccessful appellant. . . . Discouraging meritless appeals is consonant with the general purpose of section 98 et seq. . . ."].)

The *Sampson* court rejected the employee's argument that its statutory interpretation of section 1194 would discourage employees from choosing an administrative remedy over a judicial forum when the employee can better "ensure the recovery of all of his or her attorney fees." (*Sampson*, *supra*, 117 Cal.App.4th at p. 228.) It concluded the ruling would not eliminate "the efficiency and efficacy of the administrative remedy." (*Ibid.*) "Administrative relief remains an expeditious and economical way to obtain unpaid wages and overtime compensation, and the attorney fees provision of section 98.2, subdivision (c), creates a disincentive to delay payment through unmeritorious appeals to the superior court." (*Ibid.*) Because a civil action could

"result in the delay in the payment of overtime compensation because of protracted litigation and appeals[] . . . [t]he employee must weigh the benefits and risks of the two options the Legislature has established to prosecute an overtime compensation claim, and choose one or the other option." (*Ibid.*)

We note the *Sampson* court also rejected the employee's argument the trial de novo was a "civil action" that was "simply a 'continuation' of the administrative proceeding." (*Sampson, supra,* 117 Cal.App.4th at p. 228.) After explaining why the employee's case authority was inapt, the court disagreed with the theory the administrative proceeding and the trial de novo "represented a 'single legal course.' [Citation.]" (*Id.* at p. 230.) It explained, "The trial de novo following the commissioner's decision was not a continuation of the administrative proceeding, nor a prerequisite to a court action, but a *legal option contained in the administrative remedy that resulted in a new trial*. . . . [¶] In sum, we find no statutory or legal basis to conclude [the employee] entitled to recover attorney fees incurred during the administrative proceeding before the commissioner. Based on this conclusion, we also find no statutory basis to award [the employee] fees in this unsuccessful appeal." (*Ibid*., italics added, fn. omitted.) In a footnote, the court clarified the reason it was not awarding attorney fees to the employer. It stated, "Because employer did not request statutory fees on appeal, we do not address whether it would have been entitled to attorney fees under section 98.2, subdivision (c)." (*Id*. at p. 230, fn. 14.)

In summary, the *Sampson* court held an administrative proceeding was not a civil action, stating, "After consideration of the plain meaning of 'civil action,' its statutory context, and the legislative purpose and intent in creating the alternative administrative remedy in the Labor Code to recover unpaid wages, we find ourselves in agreement with employer. A civil action as used in section 1194 means a court action, not an administrative proceeding under section 98. Because an administrative proceeding is not a civil action, [the employee's] right to recover attorney fees is governed by section

98.2, subdivision (c), the attorney fees provision in the administrative remedy, not section 1194." (*Sampson, supra,* 117 Cal.App.4th at p. 223.)

The third appellate district reached a different conclusion in *Eicher, supra,* 151 Cal.App.4th at pages 1378-1379, and upheld a section 1194 attorney fee award given to an employee who prevailed in his appeal of a commissioner's decision. In that case, the commissioner ruled the employee was an exempt employee not entitled to overtime pay. (*Id.* at p. 1368.) The trial court determined the employee was not exempt and awarded him $56,353 in overtime compensation as well as $40,000 in attorney fees and $420.12 in costs, pursuant to section 1194. (*Id.* at p. 1369.) The employer appealed. (*Ibid.*)

The *Eicher* court attempted to distinguish *Sampson* as deciding a different legal issue. (*Eicher, supra,* 151 Cal.App.4th at p. 1379.) As mentioned, the *Sampson* court did not specifically address application of section 1194 to administrative appeals, and ruled section 1194 did not apply to administrative proceedings before the commissioner. However, the *Eicher* court does not explain why these legal issues should be treated differently. Nor did it criticize the *Sampson* court's holding, defining "civil action" as used in section 1194 to refer to an action initiated in court. Instead, the *Eicher* court approached the legal question raised in that appeal from a different angle, focusing entirely on the legislative purpose of section 1194 and public policy favoring employees. It held, "Section 1194 is a specific statute that allows successful employees (but not successful employers) to recover attorney[] fees. To allow the successful employee in this case to recover fees under section 1194 would not conflict with or render superfluous section 98.2 [a specific statute that penalizes unsuccessful appellants]. Not to allow the employee to recover under section 1194 would undermine the purpose of section 1194." (*Eicher, supra,* 151 Cal.App.4th at p. 1379.)

While the legal analysis in the *Eicher* opinion certainly created an equitable-sounding result for the employee in that particular case (who obtained a clear

victory in his appeal), we have concluded that upon closer examination of the legal reasoning it is unsound when applied in other factual contexts. We respectfully disagree with the *Eicher* court's construction of section 1194. (*Greyhound Lines, Inc. v. County of Santa Clara* (1986) 187 Cal.App.3d 480, 485 ["we are not bound by an opinion of another District Court of Appeal"].)

We believe the better-reasoned interpretation of section 1194 is articulated in the *Sampson* case. As described above, our colleagues in the Second District, Division Three undertook an in-depth statutory analysis of both sections 1194 and 98.2, recognized the legislative intent behind these two statutes was not identical, and fashioned a holding that successfully harmonized the various legislative goals. Because section 1194 is silent on the meaning of "civil action," we agree with the *Sampson* court that the issue of whether section 1194 applies to both judicial and administrative "actions" requires the reviewing appellate court to engage in statutory construction. "Under settled canons of statutory construction, in construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. [Citation.] We must look to the statute's words and give them 'their usual and ordinary meaning.' [Citation.] 'The statute's plain meaning controls the court's interpretation unless its words are ambiguous.' [Citations.] 'If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.' [Citation.]" (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387-388.)

In the *Eicher* case, the court turned to the legislative history of section 1194, without first examining the statute's words and giving them their ordinary meaning. (*Eicher, supra,* 151 Cal.App.4th at p. 1380.) It is undisputed the legislative history clearly announces section 1194 was created to provide a """"needed disincentive""""" for employers violating minimum wage laws. (*Eicher, supra,* 151 Cal.App.4th at p. 1380, citing Sen. Rules Com., Analysis of Sen. Bill No. 955 (1991-

1992 Reg. Sess.) as amended Sept. 10, 1991.) As also noted by the *Eicher* court, "'"'An analysis of the bill submitted to the Senate in advance of the vote stated that, '[t]hese additional remedies are especially necessary in situations where the employees themselves pursue a private action to recover unpaid wages or overtime.'"' [Citation.]" (*Id*. at p. 1381.)

To further these clearly stated legislative goals, the *Eicher* court determined section 1194 must be broadly construed to apply to all private actions initiated by employees. It reasoned an employee's right to appeal the commissioner's ruling results in a hearing that looks a lot like a civil action. The appeal requires a trial court to conduct a de novo hearing, where the parties can introduce new evidence and the trial court need not give any weight to the commissioner's ruling. (*Eicher, supra,* 151 Cal.App.4th at p. 1381.) It concluded, "Thus, for purposes of section 1194, the section 98.2 trial de novo falls within the broad definition of 'action' as 'an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, [or] the redress or prevention of a wrong . . . .' (Code Civ. Proc., § 22.) *That section 1194 refers to 'civil action' rather than 'action' is not a reasonable basis upon which to deny fees* to a successful employee. We express no view on whether a section 98.2 trial de novo constitutes an 'action' for any other purpose. (See e.g., *Rogers v. Municipal Court* (1988) 197 Cal.App.3d 1314, 1318 [although section 98.2 notice of 'appeal' may be thought of as an initial trial pleading, it is not a pleading for purposes of the rule that an officer of a corporation who is not an attorney may not file a civil complaint in superior court].)" (*Id.* at p. 1381, italics added, fn. omitted.)

This analysis recognizes there is a distinction between an ordinary civil action and an employee's appeal requiring a de novo hearing. Rather than give a plain or ordinary meaning to the statute's words, the *Eicher* court concluded the term "civil action" was a distinction that did not make a difference because the clear legislative purpose of section 1194 was to assist employees in enforcing the minimum wage and

overtime compensation statutes regardless of the forum. Ignoring the word "civil" under the pretense that this construction supports legislative goals is at odds with several basic rules of statutory construction. It is well settled that "'[t]he statutory language . . . is the best indicator of legislative intent.' [Citation.]" (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 350.) "'The court cannot ignore the plain words of the statute unless it appears the words used were, beyond question, contrary to what was intended by the Legislature.' [Citations.]" (*Pratt v. Vencor, Inc.* (2003) 105 Cal.App.4th 905, 911.)

Here, there is no indication the legislature did not intend to limit section 1194 application to actions initiated in court. As noted in the *Sampson* case, the term "civil action" is not ambiguous or subject to multiple interpretations. (*Sampson, supra,* 117 Cal.App.4th at p. 223.) If we apply the definition of "civil action" found in the Code of Civil Procedure, it describes a proceeding in a court of justice, not a claim seeking administrative remedies. (*Ibid.*) Moreover, we conclude the employee who elects to initiate a civil action is situated differently than the employee who appeals the commissioner's decision. It is foreseeable that in the latter situation the employee electing an administrative remedy has already obtained a prompt payment of wages and the appeal represents his or her mistaken belief more money is owed, i.e., Boktor's appeal. "'"In construing the statutory provisions a court . . . may not rewrite the statute to conform to an assumed intention which does not appear from its language."' [Citations.]" (*In re Hoddinott* (1996) 12 Cal.4th 992, 1002.)

As described earlier in this opinion, the *Sampson* court applied several other statutory construction canons before reaching the conclusion section 1194 only applied to actions initiated in court. We adopt this legal reasoning and agree with the *Sampson* court's determination the goals of sections 1194 and 98.2, subdivision (c), are not identical but can be harmonized. The legislative purpose in creating a special administrative forum need not be overshadowed by the equally important goals of section 1194.

As discussed in *Sampson,* the statutory scheme affords employees two different forums to resolve wage disputes, each offering a different statutorily mandated attorney fee remedy. Applying section 1194 to an administrative appeal cannot be harmonized with the specific attorney fee provision the Legislature created for employees who elected to pursue their administrative remedies. As discussed in *Sampson*, the legislative history of section 98.2, subdivision (c), was to discourage frivolous appeal to the courts by either party. (*Sampson, supra,* 117 Cal.App.4th at pp. 227-228.) We agree with its conclusion the Legislature drafted an attorney fee provision because two existing prevailing party fee provisions in place for civil actions (§§ 218.5 &1194) would not serve the overall purpose of the administrative remedies, i.e., the prompt payment of wages. "We cannot rewrite the Labor Code to give [the employee] the benefits of the administrative remedy, that is the prompt payment of wages, and the benefits of recovering all his attorney fees to prosecute his claim under the judicial remedy." (*Sampson, supra,* 117 Cal.App.4th at p. 228.) Indeed, the placement of section 98.2, subdivision (c), in the same chapter as the administrative remedy of an appeal strongly suggests the Legislature intended it to be the sole basis for attorney fees for employees electing an administrative forum for their wage dispute. (See *Sampson, supra,* 117 Cal.App.4th at pp. 226-227.)

The *Eicher* court asserts its broad construction of section 1194 does not render section 98.2, subdivision (c), superfluous. (*Eicher, supra,* 151 Cal.App.4th at p. 1381.) It explains, "Section 98.2, subdivision (c), would allow a successful employer to recover attorney[] fees if the employer prevailed in a section 98.2 'appeal' filed by the employee. The employer in such a situation would not be entitled to attorney's fees under section 1194, which authorizes fee awards only in favor of employees." (*Ibid.*) The court is describing a very unique factual scenario. As explained, the bar for

"success" is set very low for employees in administrative appeals. "An employee is successful if the court awards an amount *greater than zero*." (§ 98.2, subd. (c), italics added.) The court is suggesting section 98.2, subdivision (c), only takes effect in the rare event an employee appeals the commissioner's decision and recovers nothing ($0) following the de novo hearing.

Consider the hypothetical case where an employer successfully defends itself on appeal and the trial court significantly reduces the commissioner's award from $40,000 to $1 overtime compensation. The employer would not be "successful" and could not recover attorney fees under section 98.2, subdivision (c). However, in this same scenario, the unsuccessful employee (recovering only $1) would nevertheless have the right to recover fees if we construe section 1194 as applying to administrative appeals. We conclude such a result would render section 98.2, subdivision (c), "meaningless and without actual application." (*Sampson, supra,* 117 Cal.App.4th at pp. 226-227.) As stated, the clear legislative purpose in enacting section 98.2, subdivision (c), was to discourage appeals filed by both employees and employers and provide an expedited and inexpensive forum to resolve wage disputes. Permitting the recovery of attorney fees for every appeal of an administrative decision concerning minimum wages or overtime conflicts with the Legislature's express purpose of penalizing unsuccessful appellants seeking review of a commissioner's decision.

The *Eicher* court acknowledges it is possible "an employee's attorney[] fees in a trial de novo will exceed his or her wage recovery." (*Eicher, supra,* 151 Cal.App.4th at p. 1382.) In that case, the wage recovery ($46,617.25) was only slightly more than the amount of attorney fees ($40,000) incurred to litigate the appeal about $6,600. The court calculated this meant that after the employee paid his attorney he would only recover 14 percent of the wages due and this possible result would discourage employees from pursuing valid claims for wages. (*Ibid*.)

As mentioned above, this same argument was considered and rejected in the *Sampson* case. We agree with that court's determination limiting section 1194 to a civil action will not discourage employees from choosing an administrative remedy over a judicial forum. The employee can weigh the pros and cons of each forum. While administrative relief does not ensure the recovery of attorney fees, it does provide efficiency and a strong disincentive for employers owing wages to file unmeritorious appeals and delay payment. While, the employee in *Eicher* had a clear victory on appeal, other employees may file appeals knowing the de novo trial will be based on the same evidence presented to the commissioner, warranting the same award plus attorney fees and costs. The administrative proceedings could be used by employees as merely a practice trial. While public policy certainly "favors employees in their efforts to recover overtime compensation" (*Eicher, supra,* 151 Cal.App.4th at p. 1383), it does not support unnecessary favoritism at the employer's expense. The "well-drawn lines between the administrative and judicial remedy in the Labor Code to resolve wage disputes" (*Sampson, supra,* 117 Cal.App.4th at p. 226), must remain intact to protect the rights and interests of both employees and employers.

In conclusion, section 98.2, subdivision (c), governs Boktor's right to recover attorney fees because she elected to pursue administrative relief rather than litigate her wage dispute in court. Under section 98.2, subdivision (c), Boktor cannot recover fees because she is the appellant, and only *successful respondents* have the right to recover attorney fees. Accordingly, we affirm the trial court's ruling.

DISPOSITION

The order denying attorney fees and costs is affirmed. Respondent shall recover his costs on appeal.

O'LEARY, P. J.

WE CONCUR:

IKOLA, J.

GOETHALS, J.